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THE HUMAN RIGHTS COUNCIL AFTER THE UKRAINIAN CRISIS: PAST AND NEW CHALLENGES FOR THE PROTECTION OF HUMAN RIGHTS

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Abstract: This work aims to analyze the problems that the new Human Rights Council has already faced and the challenges opened after the war situation in Ukraine. The old accusation for the political role of the previous commission remains as a shadow even in the new council given that the problems certainly continue and will be the same, namely those of the violation of human rights. However, the daily reality needs new solutions. Evaluation, control and monitoring mechanisms are topics still under discussion given that from a legal point of view there are still gaps that concern the impartiality of this body. What is its future? What living modus there will be in the coming

years in the face of crises? These are some of the topics under investigation in this paper.

Keywords: human rights council; monitoring control; protection of human rights; chapter of the UN; international cooperation; suspension of members; review of procedure; abuse of the role of the Council; Universal Periodic Review (UPR).

THE NEW HUMAN RIGHTS COUNCIL

With the Resolution n. 60/251 of March 2006 the new Human Rights Council was established despite votes against from the United States, Marshall Islands, Palau and Israel, after reactions that the old Human Rights Commission was a political body and not purely legal and with the full support of all Member States (Kälin, Jimenez, 2003).

The Council had to complete the institutional building package that was adopted on 18 June 2007 with the Resolutions 5/1 and 5/2, i.e. evaluation and control procedures to create new support bodies, also establishing

a related code for ad hoc procedures. They were adopted in 2011 with the Resolutions 16/21 of 25 May relating to the review of the activities and functioning of the Human Rights Council.

Political institutive body or not, it was part of UN history with new elements, leaving problems relating to human rights open. The general secretary, based on art. 7 of the Charter, was responsible to guarantee human rights and the protection of the fundamental principles of the UN, i.e. the principles of international law, international peace and security. This type of institution had the objective of helping the general assembly, as required by art. 22 of the UN Chapter. It has a political compromise nature, relevant to the difficulties of applying the rules of the UN Charter as it required the unanimity of the permanent members. An aid body, like the new Council, could modify the statute of the UN according to the established procedures of articles 108-109 and the related vote of the permanent members.

The Council, unlike the old commission which was an aid body to ECOSOC (Short, 2008; Tistounet, 2010), was not far from the protection of human rights and the pillars of the Organization, that is, of security and development. The

Council as a non-political but juridical intergovernmental body included itself a commission of inquiry as a body that will help the Assembly by giving it a status in the hierarchy of the UN human rights bodies. In other words, it was the main body of the organization from a political and legal point of view.

THE MINIMUM REQUIREMENTS FOR COMPOSITION

The main problem for the Council was the criteria of participation of the states. Each state should participate not as a state body but as a body of international jurisdiction that respects minimum requirements and protects human rights. However, the members from each state had political character addressed to the commission. They were responsible for the ratification of international conventions on human rights as an essential point for the fulfillment of the main objects of fundamental rights and the protection of categories of vulnerable people and groups, as important and determined data for the development of the work of human rights protection (Zani, 2008; Boyle, 2009; Freedman, 2011).

It was a minimal but rather important criterion, highlighting that states that were late with the ratification of international conventions on human rights were confronted with national systems. Of course, this was not a sufficient element given that in many cases ratification was the result of adaptation of international obligations and from a political point of view it was interpreted according to the principles of good will. From a legal point of view, it was interpreted as a manifestation of an "obligatory" nature for states that fulfilled the conventional provisions. The criterion of acceptance of control systems of a conventional nature was foreseen for the optional protocols resulting from the UN agreements, as well as the formulation of the declarations that are foreseen by the instruments which subjected the state to a control of an impartial, independent nature and attributed to the bodies that were established in a conventional way. Accepting international control jurisdictions and one's own work for the protection of human rights was a possible deterrent for states and on the international level represented the intervention relating to control bodies.
Resolution no. 60/251 and in particular art. 8 states that:

> "(...) membership in the Council shall be open to all Member States of the United Nations (...). The 47 members of the Council are elected with a majority of 2/3 of the members of the General Assembly, following, as usual in most international organizations, an equal geographical distribution for a period of three years and are not immediately re-eligible (...)[1]".

All member states of the organization were candidates, thus providing for the arbitrary nature of the election and contribution to the protection of human rights related to the commitments they made. Additionally, it is not a question of requirements-where one's possession was necessary for the nomination-but the guidelines for the choice of candidates that the member states of the Assembly had to follow without taking into consideration the relationships that were of political and economic nature and mixed between them.

A particular case was, as usual, the participation of the United States due to the political character of the Council

[1]Recall that the division was made between 13 seats for the states in Africa, 13 seats for the Asia Pacific states, 8 seats for the Latin American and Caribbean states, 7 seats for the West and various other states, 6 seats for the states of Western Europe.

and its membership which had always been opposed to supranational control bodies, especially with regards to the protection of human rights. On 19 June 2018, the United States left the Human Rights Council and Iceland took over. The main motivation for it was its political character and/or because it did not agree with its role as a protagonist on the international stage for the protection of human rights. The US accused the Council of violating human rights regarding the situation in Iran by presenting various political biases. These are perhaps internal political choices that were at odds with the American system of foreign policy and its role of hegemony. We do not forget another parameter that was established after the Report on extreme poverty and human rights on his mission to the United States of America by the Special Rapporteur Prof. Philip Alston. It saw the light, on 4 May 2018, reporting serious violations against human rights by the American government, of the former President Trump. Even the president himself at the time was unable to understand the general global change that was also influencing the protection of human rights[2].

[2]According to the Report: "(...) American exceptionalism was a constant

There is certainly a change with the current President Biden. Since 2021 they have regained the status of observer and are elected for three years as members of the Council starting from 2022. The official statements were important given that they spoke for authoritarian regimes that denounced the violations of human rights. Of course, the participation of the American government from scratch shows the diplomatic weight as well as the general effort for the defense and promotion of human rights that are once again found at the center of American politics.

SUSPENSION OF MEMBERS

The Resolution 60/251 of 15 March 2006 recognized in the field of human rights the possibility for the General Assembly to have the right to suspend a state and/or states from being a member of the Council when flagrant

theme in my conversations. But rather than fulfilling the admirable commitments of its founders, the United States today has revealed itself as exceptional in far more problematic ways that are unexpectedly at odds with its immense wealth and founding commitment to human rights. Consequently, contrasts between private wealth and public squalor abound (...)".

violations against human rights are noticed. The Resolution itself in point 8 already stated that:

> "(...) General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights (...)"[3].

The suspension was a procedure which had an aggravated nature for the majority of two thirds of the members of the Assembly after the systematic violation had been ascertained, also excluding the provision which constituted for the Member States the indication of an election for the new members in the Council. We have seen that the suspension procedure has found ground in the past with Libya which suspended itself from the Council in March 2011 and returned after the Gaddafi regime[4]. A second time was at the moment that the Russian Federation attacked Ukrainian soil. It was the General Assembly after the proposal of the US 7 April 2022 with 93 votes in favour, 24 against and 54 abstentions to bring to the table the Russian

[3] https://www2.ohchr.org/english/bodies/hrcouncil/docs/a.res.60.251_en.pdf

[4] UN Doc. A/Res/65/264 approved, unanimously, on 1 March 2011.

suspension from the human rights council for serious and systematic violations of human rights in the territory of Ukraine[5]. This resolution shows that geopolitical strategies seek to profile the framework for maintaining international peace and security of the UN after the outbreak of the conflict in Ukraine. The abstentions for the vote for the adoption of the resolution were a demonstration for the Americans of a very important challenge that continues to go forward and last a long time.

The positive votes for the resolution decreased and those who respected the resolutions of the assembly increased after the abstentions, thus continuing the ongoing war with no end in sight. Various resolutions affected the legal status of Russia, which was simultaneously a permanent member of the Security Council, suspending its role in the defense of human rights. Many countries voted against the resolution and were accused of serious human rights violations as they feared various types of reprisals and contradictions against themselves. On the other hand, China's role was very important given that it voted in favor of the resolution. The Chinese ambassador already stated

[5] UN Doc. A/ES/11/L.4

that:

> "(...) any hasty move in the General Assembly would be like adding fuel to the fire, as it would aggravate divisions, intensify the conflict and endanger peace efforts (...)".

THE ROLE OF CONTROL

We must say that as far as monitoring is concerned, within the scope of the human rights Council, it has remained the same with what was adopted by the previous commission. The Council adopted the public procedure which was created by the old Economic and Social Council Resolution No. 1235 of 1967 which highlighted public debate relating to situations in countries dealing with gross violations of human rights and/or large-scale violations relating to individual countries. This is a procedure that involved the creation of ad hoc protection and control mechanisms[6].

[6]For ordinary violations of human rights the commission spoke to us justifying serious and systematic violations as ordinary violations excluded from the competences of the bodies of the UN because they enter the sphere of national jurisdiction and as foreseen by art. 2, par. 7 of the charter of the UN. The objective was for the commission to have and not lose its political role despite the contrary opinions recognized by various

This public procedure concluded with the adoption of a resolution which was composed of two parts.
The first contained the evaluation, control of the internal situation of an interested state and the terms used to give effectiveness to the application of human rights. We can characterize it as a simple concern that went as far as condemnation, that is, a term that corresponded to the pressure exerted on the state. The resolutions contained an invitation addressed to the authorities of the state concerned with the objective of protecting human rights while remedying past violations so as not to be repeated in the near future. The resolutions concluded a recommendation that fell within the sector of the international monitoring procedures without having a binding nature. This type of resolutions had a strong political impact for the future of the international community and above all with regards to international responsibility for the protection of human rights. The states involved demonstrated that the efforts that are made through a final resolution of a conviction were perceived as a sanction where the prestige of their credibility did not fall

states and to put its internal affairs under scrutiny.

within the domestic sphere but on the international one. Thus the states involved or not were afraid regarding the indirect effects of a condemning resolution, especially in the field of foreign policy and in the sector of development aid.

The second procedure was of a confidential type. It was established, with the Resolution no. 1503 of May 1970, of the Economic and Social Council. This resolution established the relevant procedure which gave the old commission, now the Council, the relative power to examine the communications and propose to individuals and/or groups of individuals:

> "(...) which appear to reveal a consistent pattern of gross attested violations of human rights and fundamental freedoms (...)" (Tardu, 1980)[7].

The anonymous form for an international complaint was not admissible even if the internal means of appeal were exhausted. With procedure no. 1503, for the first time, we noticed the introduction of the right of petition of individuals to the UN bodies, that unsuccessfully argued for the adoption of a universal declaration. The individual

[7] https://digitallibrary.un.org/record/214705?v=pdf

communications that also came from groups and/or non-governmental organizations did not have the force of an appeal that had to do with the repair of damage that was suffered and the related instrument brought to the attention of the council for widespread violation of human rights. The final outcome of this procedure was simple recommendations which had no binding effect. This involvement of private individuals and non-governmental organizations in relation to the complaint of violation of human rights was an important step towards the international effort to sanction every type of violation of a confidential nature of the procedure that was eliminated as a result of sanctions that characterize the public procedure.
As another type of control, proposed by the Council and used in practice by the commission in the past, was the special procedure, which was established by the Resolution n. 1979/36 of May 1979 and adopted and proposed by the economic and social council.
This special procedure for the council aimed at the relative behavior of states to respect rights according to their own issues, as well as the behavior of certain states for demonstrating human rights in practice and as a whole.

Procedures, which involved the relative assignment of the specific mandate of experts in the collection of information, were carried out after the consent of the state that was interested for the formulation of the relevant recommendations on issues that had to do with the general situations of certain states. Its application was extended to non-serious and systematic violations. The special procedures were different from past procedures that dealt with objectives. An important objective basis was to reach a solution where the state concerned, in the case of minor violations, did not put an end to the violation which had a continuous character to repair the damage suffered by individuals. These types of effects on special procedures have already reported above, having a political basis and the willingness of states to collaborate in an investigative phase of the procedure, as a result of recommendations that were directed towards this objective (Marie, 1975; Tolley, 1987; De Zayas, 2009).

The Council remained close to the advisory committee through Resolution no. 5/1 as an aid body to give opinions and advice. It was a subsidiary body which was constituted by experts of the Council on a basis, where nominations

from member states, carrying out their mandate in an individual capacity, were important for their independence, impartiality recognized in the experience in the susceptible sector of human rights, in research on the topic of protection of human rights[8].

(Follows): UNIVERSAL PERIODIC REVIEW (UPR)

The Universal Periodic Review (UPR) was a relative novelty that was foreseen by the resolution of the human rights Council according to par. 5, letter. e) (Gafr, 2007; Vengoechea-Barrios, 2008; Fassassi, 2009; Tomuschat, 2011; Thèvenot-Werner, 2012).

The UPR was a cooperation mechanism with the possibility to examine compliance with the human rights obligations that were foreseen by the principles of the UN Chapter and by all existing organizations of the matter. All member states of the UN must undergo the council to the main objective of avoiding the political character of the body and

[8]The relevant Committee made up of 18 experts and the related De Alba package had the objective of defining the nomination and selection procedure (para. 70).

discriminations that had to do with the treatment, as a main problem of the previous commission, but without arriving at a positive final goal.

The relevant procedure of the UPR was difficult and complex from the beginning and was based on information that was not always reliable. This information came from the Council and from documents such as from the High Commissioner as well as from other interested parties including non-governmental organizations working in the field of human rights and in the country which was undergoing the relevant assessment.

The general framework of the state that was under review was of an institutional and regulatory nature indicating the best practices that are adopted by the state, identifying the problems regarding the solutions that the state intended to adopt in this regard.

This function was carried out by an external body from the same organization where it had the advantage of being an individual body taking on the role of compiling a document that contained information relating to the situation of a state, information coming from sources that were not institutional, thus contributing significantly to a path of

objectivity and transparency regarding the data known to the board and as a consequence of a controlled and improved evaluation by the board. Non-governmental organizations also played an important role due to their nature, suitable for providing external data from political considerations but within the scope of the international community which concerned the protection of fundamental rights.

The mixing of the international and national levels through the UPR was an important step as it took into account the continuous dialogue of the state authorities with the Council, ending up with the drafting of a text summarizing all the relevant results. The document includes all the recommendations, that are addressed to the country in question, by the competent agencies that came from the UN in the form that invited them to provide the relevant technical assistance. The document was then sent to the relevant UPR commission which functioned in a plenary manner and then transmitted to the Council for its approval. Prior to the final review the country submitted its comments, regarding the measures that are taken at national level to implement the relevant recommendations,

it has received. The UPR thus presents itself as a cooperation mechanism where the Council performed the functions of a commission of inquiry to conduct the relevant positive or negative results according to the degree of collaboration where the state and the Council were able to develop.

The complexity character of the UPR remains, not facilitating the working group, that was created within the council, composed by only three states, which supported the state that was under investigation, as rapporteur states, which presented the situation related to the investigation. The observations, recommendations of the Council as well as the state concerned opted for an immediate response reflecting the partial and/or total transposition for its rejection. The final recommendations that are adopted were subject to review. A final examination for the publication of the relevant outcomes based on a dialogue, of an interactive nature in the session, that went above the Council, thus starting a second level control. Consequently, the state had to adequately provide the relevant documentation for the implementation of the recommendations through various future interventions to

adopt the acts, measures for the protection and promotion of human rights at the national level.

(Follows): REVIEW OF THE PROCEDURE

As we have seen, the UPR procedure in practice involves various subjects at an international and national level, thus presenting problems that cannot be solved by creating a guarantee of relative effectiveness of the council's activity. The collection of information that is required for its implementation by the UPR is mandatory for all member states, thus responding to the universality of the action of the council and at the same time to the treatment of all states avoiding in such a way the previous criticisms towards the commission. The final objective of the examination was to evaluate the ways in which the state put the protection of obligations as well as commitments undertaken in the field of human rights at the forefront. This path was, however, still being investigated by the Council.

The relevant investigation path was based on point 5, letter. e) of the Resolution n. 60/251 which stated:

“engagements en matière de droits de l’homme”; the fulfillment by each state of its human rights obligations and commitments certainly constitutes a difficulty in the Council's working method.

We are talking about obligations that refer to legal obligations and conventions, to international acts that are legally binding on the state that is under investigation. Using the term commitments/engagements we can speak for the relative generic use of investigation covered by a legal profile which referred to a commitment that was based on declarations, resolutions and soft law texts. These are soft law acts that do not have the same gravity as the failure to fulfill an obligation that has a legal basis and is relevant to the political one. Human rights acts are obligatory for states that have a universal nature but also national, regional where the general nature of the provision allows the council to evaluate the relative behavior of the state in relation to acts that have universal application and to acts of a regional character. This is a hypothesis that occurs on a periodic basis in the majority of the states that are part of the Council. Not specifying the board's action also means overlapping and duplicating

other control procedures. Some conventions which have the protection of human rights as their theme and which have established ad hoc control bodies are limited to compliance with the same rules.
Of the same reasoning is the Resolution 60/251, where in point 5 par. e) and in relation to the board's examination reports that: "a mechanism shall complement and not duplicate the work of treaty bodies". By carefully reading, one immediately understands that the activity of the Council does not concern the cases that are discussed by other international bodies but it is only an application that concerns the general principle inspired by the ne bis in idem which excluded the behaviors that were evaluated by the organ of a conventional nature. This type of interpretation has to do with the prediction, that the council's activity brought to the table, taking into consideration the investigation that has already been carried out by conventional bodies. Thus, it was expected that the mechanisms would favor coordination by avoiding overlaps with reports that were submitted by states in application of the norms that were foreseen in human rights conventions. Thus the complementarity between the

mechanism itself and that of the control committees is implemented[9]. With the Resolution n. 9/8 the Council asked the general secretary to present an annual report which elaborated the recommendations that were adopted to improve, reform and harmonize the relevant system of a conventional nature without arriving at a definitive solution[10].

The Council could not take into consideration situations made by other bodies even if they had a supranational character as well as by provisions that were part of international treaties given that the UPR was based on an investigation of an overall nature which concerned the situation of a state and not of individual violations that concerned individual human rights and/or of a specific area or region. A solution was given via the Resolution n.

[9]The UPR was based on a fairly accelerated system of the procedure through the periodicity of the examination conducted within the period of four and a half years and divided into three annual sessions leading to a final examination. Furthermore, the voluntary fund has also been adopted to provide financial and technical assistance to countries under investigation.

[10]Resolution of the Council of the UN Doc. A/HRC/52/20 of 9 December 2022.

60/251 relating to the final report where the state concerned, through any recommendations it received, the procedures concluded and underway by supervisory bodies at international level but without a final positive result. The control bodies, the charter and the treaty bodies were distinguished through the principle of complementarity between control bodies and the protection of human rights, thus representing topics of complex investigation as fundamental elements for improving the individual bodies and avoiding the useless duplications of investigation that they reached dangerous conclusions.

The recommendations that came from the UPR contained criticisms that had to do with the behavior that called for internal changes following the states that did not implement. The Council of Europe could thus establish a sub-commission to verify the resolutions that are adopted to arrive at the relevant sanctions, thus foreseeing that the state follows a path of adaptation towards what the council has decided after the conclusion of the UPR and without being elected member of the council until the relevant indications it had to receive. Thus states could consider resolutions that were suitable for them by implementing

the minimum requirements for participation in the Council.

CONCLUDING REMARKS

The previous commission was accused of its political role. From what we have understood so far we can see that even the new council is not without elements of discussion, gaps, complexity and vagueness which concerned the revision of the control procedures for giving greater effectiveness to the guarantee of the protection of human rights.

If this were the case, the new council also risks following the same path as that of the previous commission. Of course, the problems concerning the election of members of the council, who did not respond to the guarantee and protection of human rights, are open, as are those linked to the behavior of the council as it seems from its impartial objective and initial expectations. Currently and in the near future, we'll see how the situation will go regarding the behavior towards the principles of the UN of Yemen and of China.

Regarding the war in Yemen, the group of experts, which

was part of the new human rights council, through the Resolutions n. 39/61 (2018), 42/2 (2019), 45/15 (2020) and of the Human Rights Council in October of 2021, did not adopt a resolution to renew the mandate of the expert group, since it used a vote based on roll call without adequate legal justification[11]. The negative decision, which was adopted by the Human Rights Council after the assessment of the group of experts- who supported the political will of the situation in Yemen-showed that the regional civil society organizations and related human rights defenders, who were part of the own country, point out that the mandate of the group of experts was revoked. This happened due to the increasing casualties of the conflict. Indeed, Saudi Arabia used the relevant combination of threats to revoke the mechanism for assessing and monitoring violations in this state.

We are referring to the case of China when we speak out of doubts and lack of impartiality of the human rights council. The China problem was created after the related report published in 2022, drawn up by the United Nations High Commissioner for Human Rights concerning China and the

[11]Resolution of the council of the human rights A/HRC/48/l.11.

Xinjiang Uighur Autonomous Region (XUAR). A report calling for human rights violations against Uyghur and Muslim communities in the area stated that:

> "(...) allegations of patterns of torture or ill-treatment, including forced medical treatment and adverse detention conditions, are credible, as well as allegations of individual incidents of sexual and gender-based violence (...). The OHCHR states that the extent of arbitrary detentions against Uighurs and other people, in the context of restrictions and deprivations more generally of fundamental rights, enjoyed individually and collectively, they may constitute international crimes, in particular crimes against humanity (...)"[12].

The High Commissioner asked China to bring reforms at the national level especially concerning national security due to the terrorism problem it had in the XUAR area and in:

> "(...) full compliance with binding international law on human rights and to repeal all laws that do not comply with international standards (...) a government investigation into allegations of human rights violations in camps and other detention facilities, including allegations of torture, sexual violence, ill-treatment,

[12] https://www.ohchr.org/en/documents/country-reports/ohchr-assessment-human-rights-concerns-xinjiang-uyghur-autonomous-region

> forced medical treatment, as well as forced labor and reports of deaths of individuals in custody (...)"[13].

China responded that the accusations were baseless and have nothing to do with fighting terrorism but based on the rule of law and its consideration and involvement with the suppression of ethnic minorities. Vocational education and training centres, learning facilities that were established, intended to fight terrorism and concentration camps are not defined in the high commissioner's report. For China, there is no violation of human rights. Instead, China has asked the international community to face the truth on counter-terrorism. Obviously the Council decided not to listen to China's motives and took action in the UN Human Rights Council on 28 September 2022, with the Resolution A/HRC/51/L.6. During the 51st session it decided not to discuss the situation that has arisen for human rights in China in the Xinjiang area where for years it had been the center of reports of human rights crimes against humanity. The council stated that:

> "(...) prenant note avec intérêt de l'évaluation par le Haut-

[13] https://www.ohchr.org/en/documents/country-reports/ohchr-assessment-human-rights-concerns-xinjiang-uyghur-autonomous-region

> Commissariat des Na- tions Unies aux droits de l'homme des préoccupations relatives aux droits de l'homme dans la région autonome ouïghoure du Xinjiang (Chine), publiée le 31 août 2022, décide de tenir un débat sur la situa- tion des droits de l'homme dans la région autonome ouïghoure du Xinjiang à sa cinquante-deuxième session, au titre du point 2 de l'ordre du jour (...)"

but no debate on the High Commissioner's report took place during the indicated session which took place from 27 February to 4 April 2023[14]. The general secretary of Amnesty international affirmed that:

> "(...) the main United Nations body on human rights has taken a farcical position: to be on the side of those who violate human rights and not the victims (...)".

We should note that for many years the Human Rights Council has not taken action against a permanent member of the UN Security Council. It seems to us that in 2024 if we see a report from the High Commissioner it will have a conciliatory role and will certainly not reflect the reality of the situation in the area.

Objectivity, political nature of a body, lack of impartiality

[14] https://www.ohchr.org/en/news/2022/10/human-rights-council-adopts-21-texts-and-rejects-one-draft-decision-extends-mandates

are some of the arguments under test for the council without an answer until now. The review of the Human Rights Council is necessary. The political and legal difficulties are a sign of commitment that puts the UN once again before the theory of multilateralism and cooperation at a global level. UN is an organization that since its inception has had an important, decisive role towards the promotion of the guarantee of human rights and human life in general.

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